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BEFORE THE ARIZONA CORPORATION COMMISSION

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IN THE MATTER OF THE FORMAL COMPLAINT OF ACCIPITER COMMUNICATIONS, INC., AGAINST VISTANCIA COMMUNICATIONS, L.L.C., SHEA SUNBELT PLEASANT POINT, L.L.C., AND COX ARIZONA TELCOM, LLC.	DOCKET NO. T-03471A-05-0064

REPLY IN SUPPORT OF MOTION TO STRIKE

Cox Arizona Telcom ("Cox") submits its Reply in further support of its Motion to Dismiss. Although a procedural order was issued on Friday, August 11, 2006 denying the Motion to Strike, the timing of the issuance of the procedural order simply did not afford Cox an opportunity to file a reply or to rebut assertions made by Staff in its response (which was filed on August 9, 2006). Therefore, Cox is filing this reply to address the assertions by Staff and as a request for reconsideration of the denial of the Motion to Strike.

In its response, Staff takes the untenable position that because full compliance with the Rules of Evidence is not required in an administrative proceeding, Staff is free to offer speculative and unfounded assertions about what documents mean, what Cox and third parties intended, and what the law requires. Staff further submits without authority that it can offer up double and even treble doses of such testimony simply because this is an administrative proceeding. But, as Staff well knows, due process protections do apply to Commission proceedings to require fundamental fairness. The pages and pages of repetitive, argumentative, unfounded speculation offered by Staff witnesses – which is presented by Staff witnesses as actual fact – encroach upon the fundamental fairness of this proceeding.

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As Staff has acknowledged, Staff witnesses played no role in the actual events surrounding the Vistancia contracts. They have simply reviewed the extensive volume of documents and data set responses that Cox voluntarily produced. Indeed, this is an important role, because Staff can identify relevant documents and information for presentation to the ALJ and Commission in order to assist the fact-finding process, and can offer some recommendations based on its review. However, the Staff witnesses have not limited their testimony to what they actually know – that is, what the documents and responses say. Rather, based on their review of documents, Staff witnesses now pretend to *know* the actual facts. They go so far as to pretend to know what Cox and Qwest intended, even though the documents do not state what Cox or Qwest intended, and even though the documents support entirely different facts than what the Staff witnesses assume.

There are many examples of this overreaching by Staff witnesses to offer speculative conclusions that are stated as factual matters. For one example, Mr. Fimbres states affirmatively that VoIP could not have been a competitive concern to Cox in Vistancia. (Fimbres at 6) However, as Tisha Christle points out in her testimony, a hand-written note prepared by the Cox employee who undertook financial calculations to determine the amount of capital contribution required from the developer specifically references that the "risks" to building out to Vistancia include "VoIP cells." (Christle Rebuttal Testimony at 3, attaching TC-32) For whatever reason, Mr. Fimbres ignores this document and reaches an incorrect assumption that he proceeds to offer as being a true fact. Because Mr. Fimbres is a Staff member, his testimony is clothed with the appearance of being from a neutral party whose role is to assist the Commission in determining the facts. In reality, however, Mr. Fimbres' testimony is nothing more than argumentative speculation.

There are many other examples that, taken collectively, render the Staff testimony fundamentally unfair. For example, the Staff witnesses repeatedly make statements asserting that Cox knew that its conduct was unlawful. (*See, e.g.,* Abinah at 6, Cox was "aware of the discriminatory nature of the arrangement"; Fimbres at 30, "Cox management was aware of the anti-competitive nature of discussions with Vistancia".) First, there has been no legal

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determination that any conduct was unlawful; indeed, the Vistancia contracts were possible only because the City of Peoria granted the developer an MUE, and Staff's assumption that the City of Peoria would approve *unlawful* conduct is unfounded and contrary to legal principles that render municipality actions facially valid. The Staff witnesses are not lawyers and have no education or training even to offer an opinion as to whether the MUE arrangement was unlawful.[1] Yet they simply assume that it was. At any rate, even if a court of law were at some point to address the issue and determine that an MUE arrangement is unlawful, that would **not** mean that Cox knew that its conduct was unlawful. In fact, Staff asserts in its response brief that this MUE arrangement may be "the first of its kind in the United States" (Staff Response at 1), undermining any argument that Cox could have known that the MUE arrangement was unlawful. Despite this, however, the Staff witnesses construe documents -- which state only that the developer communicated that it knew of ways to "keep the competition out" -- as necessarily meaning that Cox knew that entering into the MUE arrangement was unlawful. In fact, there are legal ways to "keep the competition out," as evidenced every day by MDU agreements that apartment building owners require before allowing selected a service provider to access the property.[2] Moreover, as Staff points out, the Vistancia contracts came from a law firm in Indiana -- and, indeed, were copyrighted by the law firm in Indiana -- which is strong evidence against the Staff's assumption that Cox entered into the contracts knowing them to be legal. The more rational assumption -- if an assumption is to be made-- is that Cox understandably relied on assertions that the MUE

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[1] Staff suggests that its testimony drawing legal conclusions should be permitted because Doug Garrett offers his legal opinions. Staff overlooks the fact that Mr. Garrett has been forced to respond to improper testimony offered by Staff's witnesses, and must offer his testimony about legal conclusions now in the event that Staff's improper testimony is not stricken.

[2] Staff's assertion that the statement by Shea-Sunbelt about "keeping the competition out" is evidence of anti-competitive conduct is wrong as a matter of law and serves to underscore why Staff's unfounded and conclusory testimony cannot be permitted to stand. There are numerous types of legal contracts that have the effect of "keeping the competition out." A covenant not to compete is one common example. *See, e.g., Business Elec. Corp v. Sharp Elecs. Corp*, 485 U.S. 717, 729 (1988)(a covenant –not-to-compete is an "ancillary restraint" on competition that actually "enhances" commerce and is therefore pro-competitive). Another such example is an exclusive dealing arrangement (such as the agreement by McDonalds to carry only Coca Cola products). See ABA, Antitrust Law and Developments at 215 (5th ed 2002)("The [Supreme] Court has recognized that these [exclusive dealing] arrangements may have procompetitive effects . . . ."). In short, Staff's purported testimony that the actions of Cox were "anti-competitive" is blatantly conclusory and is devoid of any sound legal or factual analysis.

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arrangement was legal, since the contracts for the arrangement came with copyright protections from an Indiana law firm.[3] But the point is, Staff witnesses should not be making assumptions based on reading documents (and then presenting their assumptions as being true facts!). Such testimony is not truly "evidence," but is simply unreliable speculation that can serve no valid purpose, and that renders the proceeding fundamentally unfair.

There are other examples of this type of improper testimony. Staff repeatedly asserts that the Vistancia contracts were "devised" and "crafted" by Cox. (*See, e.g.*, Fimbres at 15; Rowell at 15) But, again, this testimony is based solely on the witnesses' unfounded interpretation of the documents. There are no documents saying that Cox "devised" or "crafted" the agreements that the Staff witnesses are merely bringing to light to assist the Commission. Rather, the documents actually show that Cox had originally drafted traditional preferred provider agreements -- arrangements that the Commission has previously found to be pro-competitive -- and that Shea revised the agreements using copyrighted form MUE contracts. (*See* Christle and Trickey testimony) The undisputed evidence is that a law firm in Indiana "devised" and "crafted" the form MUE contracts. For Staff witnesses to put their own, argumentative and unfounded "twist" on the documents is not helpful to the Commission and is fundamentally unfair. This is not factual testimony; it is unfounded advocacy that would not be permitted to be made even by an attorney during closing argument without an adequate showing of a factual predicate for the argument.

There are many more examples, but, for the sake of brevity, we offer only one more. The Staff witnesses apparently want the ALJ and the Commission to believe that Qwest has been injured by the MUE arrangement, because they offer their unfounded opinions -- again, stated as fact -- that Qwest wanted to build out to Vistancia but did not do so because of the MUE arrangement. (*See, e.g.,* Fimbres testimony at 10-12) But, for reasons we can only guess, the Staff witnesses do **not** point the ALJ and the Commission to language in documents that supports

[3] As offered in Linda Trickey's rebuttal testimony, materials from the Indiana firm have now been obtained from Shea-Sunbelt's outside counsel and presented to the Commission. These document confirm that the Indiana firm was representing the MUE arrangement to be legal and, in fact, charged Shea-Sunbelt $75,000 for the privilege of using the copyrighted MUE contracts.

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that testimony and, more importantly, these Staff witnesses do **not** reference documents that flatly undercut their assertions. For example, they do not point to hand-written notes in which Cox personnel recorded statements from Shea representatives as follows: "Qwest is requiring capital costs S of Dixileta but they will give the rights to Asipter [sic] if forced to build" (*see* AFF-6 attached to Fimbres testimony) and "Qwest not willing to extend network" (*see* AFF-7attached to Fimbres testimony). The fact that Staff witnesses have made unfounded assertions while ignoring factual evidence to the contrary belies any contention that this Staff testimony is serving to assist the fact-finding process.[4]

Contrary to Staff's comments, Cox is aware that the Rules of Evidence do not apply fully in this proceeding. But testimony that purports to be factual yet is nothing more than speculation and conclusions about the meaning of documents and intentions of others is not proper testimony in any proceeding. ACC Rule R14-3-109.K specifically provides for relaxing the Rules of Evidence "when deviation from the technical rules of evidence *will aid in ascertaining the facts*." (emphasis added) Speculative and conclusory testimony cannot help the fact-finder and therefore does not meet the requirements of ACC rules. Moreover, speculative testimony that might be permitted in small doses cannot be tolerated when it reaches levels that arise to fundamental unfairness. *See, e.g., United States v. Mitchell*, 1 F.3d 235 (4th Cir. 1993) (repetition of unfounded assertions through testimony and prosecutorial argument was fundamentally unfair and amounted to a violation of due process). Staff's belittling of Cox's citations to civil and criminal cases entirely misses the point: fundamental fairness and due process are constitutionally protected rights in administrative proceedings. Staff's surprising suggestion in its Response that Staff and the Commission can proceed without regard to principles of fundamental fairness and due process is not only incorrect but also, if accepted, would undermine public confidence in the proceedings conducted by the Commission.

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[4] As Cox pointed out in its motion to strike, all three Staff witnesses repeat the conclusory allegations of Accipiter's complaint at length. Although Staff states that the witnesses were putting their testimony in context of the allegations, it is interesting that none of the Staff witnesses bothered to point out Cox's denials of the allegations. More to the point, however, this proceeding is not about Accipiter's complaint, because Accipiter has settled with Cox, and, even if it were, self-serving allegations of a complaint are not proper evidence.

Thus, for all of these reasons, and the reasons stated in Cox's motion to strike, Cox requests that the ALJ strike those potions of Staff's testimony specified in the motion to strike.

RESPECTFULLY SUBMITTED this 14th day of August, 2006.

COX ARIZONA TELCOM, LLC.

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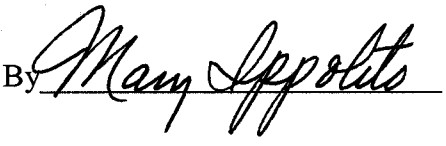
By 

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